BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision no: [2012] NZREADT 40

Reference no: READT 116/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**LLOYD KLEE**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10064)**
	First respondent
AND	**ANGELA LITTLE**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

HEARD at TAURANGA on 28 May 2012

DATE OF DECISION: 23rd July 2012

REPRESENTATION

The appellant on his own behalf
Mr S Wimsett, counsel for the first respondent Authority
Second respondent licensee on her own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Lloyd Klee (the appellant) has appealed against the decision of the Complaints Assessment Committee 10064 (Committee) to take no further action on his complaint against licensed agent Angela Little (Licensee).

General Facts

[2] In 2010, the appellant (and his wife) appointed Spiller & Little Ltd (Spillers), as an agent and part of the Bayleys franchise, to sell their property. Bridget Dickson

was the salesperson engaged to market and sell the property and she is the manager of Spillers.

[3] About three or four weeks after agreeing to pay nearly $7,000 for advertising, the appellant requested to have the word *"Auction"* imbedded in red on the published advertising photograph for the property. This request was declined by the licensee on the basis that it did not comply with Bayleys' advertising policies. Instead, a *"final viewing"* tag in blue was used on the advertising.

[4] By way of compensation for not putting *"Auction"* in red across the advertising as the appellant wished, Spillers ran the property as a feature on their e-newsletter and distributed colour fliers for free.

[5] There was a subsidiary allegation of the appellant that Spillers wrongly advised him that the property's value was in the mid $700,000's as opposed to the $900,000's, as he put it.

[6] As it happened, the property did not sell at auction but an offer was subsequently presented through Spillers to the appellant (after negotiations) at $800,000. This offer was not accepted by the appellant who eventually sold the property for $845,000.

The Decision of the Committee

[7] The Committee found that there was no unsatisfactory conduct on the part of the licensee in regard to either aspect of the complaint. Portions of the Committees most helpful 3 November 2011 decision read:

> *"1.4 non following instructions regarding advertising: The complainant complains that when, part way through the advertising campaign, he asked for changes to be made to the format of the advertising photos, his instructions were not followed. Essentially, the complainant wanted the word 'Auction' to be placed prominently in red across the photo. The complainant feels that the reason given for this (that Bayleys' policies did not permit it) was insufficient.*
>
> *1.5 Suggestion that the property was worth $200,000 less than the appraised value: The complainant states that, on the basis of only one viewer comment, Spillers stated that the property was worth about $200,000 less than the value appraised by Ms Dickson.*
>
> ***2. Material Facts***
>
> *2.1 All dates are in 2010 unless otherwise stated:*
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> *2.2 The date of listing of the property is not clear from the documents, but it is not critical to the complaint. A date of 27 October was set for an auction for the property. Prior to this, the complainants had attempted to sell the property. Ms Dickson has advised that it had been on the market for some time, but it is not clear if this was by way of a private sale, and that the price was in the $900,000s.*

2.3 Ms Dickson advised the complainants that she appraised the value to be in the $800,000s. She has stated that the most comparable property was marketed for Auction, no price was listed.

2.4 At some point during the advertising campaign (full details have not been provided to the Complaints Assessment Committee) there were some problems with some scheduled advertisements. The complainant hints in his email of 25 May to the Real Estate Agents Authority (the Authority) that this was "Joint Bayleys/Herald failures" but it seems that there was compensation given by the New Zealand Herald (the Herald) for these mistakes, and the Herald seems to have accepted responsibility for them. No evidence before the Complaints Assessment Committee (the Committee) suggests any involvement by Spillers in this.

2.5 Interest in the property does not seem to have been great. There were a handful of viewers and according to Ms Dickson, and confirmed by the licensee, there was some buyer feedback that the property was worth somewhere in the $700,000s.

2.6 On 4 October, whilst the advertising campaign was underway, the complainant requested that all advertising photos be changed to include a red "Auction" banner in one corner.

2.7 This was not done. A change was made to add the words "Final Viewing" in blue instead.

2.8 It seems to be accepted that Ms Dickson advised the complainant that she did not have any powers to alter this, due to Bayleys' very prescriptive advertising restrictions. The licensee sought the confirmation of Richard Graham, National Marketing Manager for Bayleys (Mr Graham).

2.9 The property was not sold at auction, but it seems that either on that date or shortly afterwards an offer of approximately $750,000 was presented to the complainants, and after some negotiation, the licensee and Ms Dickson recall that the prospective purchasers came up to $800,000.

2.10 The complainants advise that in April this year they were successful in selling the property for $845,000."

...

Discussion [By the Committee]

"4.1 Non following of instructions regarding advertising: The real issue here surrounding the requested red banner saying "Auction" on the advertisements. The complainant appears to be strongly of the opinion that the non inclusion of this robbed the advertising campaign of much of its impact, and resulted in poor results.

4.2 The evidence before the Committee shows clearly that the licensee's decision not to alter the advertisement as requested was out of her control. She was following Bayleys' guidelines. This has been confirmed by Mr Graham.

4.3 It is not the role of the Committee to comment on these guidelines or their reasonableness, nor is it possible for the Committee to comment on whether such a change would have made any difference to the outcome.

4.4 the licensee did recognise that the complainants were unhappy concerning this, and to compensate them Spillers arranged for some additional advertising at no cost to the complainants.

4.5 The Committee is of the view that there was no unsatisfactory conduct on the part of the licensee in this regard.

4.6 Suggestion that the property was worth $200,000 less than the appraised value: It seems to be agreed that there was not considerable interest in the property at this time.

4.7 The licensee and Ms Dickson both advise that the market was rather uncertain at the time. Although the appraisal was for a value in the $800,000s, the only offer that was forthcoming was for $750,000, although the buyers were evidently prepared to pay $800,000.

4.8 Spillers state that buyer feedback was that the property was worth in the $700,000s rather than the $800,000s.

4.9 The licensee has stated that when a property has been on the market for some time, this affects the interest, and the Committee agrees with this.

4.10 The Committee also notes that the offer actually presented to the complainants was for $800,000 which was not in any way widely differing from the appraised value.

4.11 The licensee states that she considers the offer to have been a reasonable one, but notes that the complainants were entirely entitled not to accept it. The fact that they later sold for a higher price is not really relevant to this complaint.

4.12 The issue to be considered is whether Spillers misled the complainants as to the value of the property and no evidence before the Committee suggests that this is the case.

4.13 The licensee has stated that a property is only worth what a buyer is prepared to pay at any particular moment in time, a buyer was prepared to pay $800,000 for the property although this was not accepted.

4.14 Accordingly, the Committee finds that there was no unsatisfactory conduct in regards to this point.'

Relevant Statutory Provisions

[8] Section 72 of the Real Estate Agents Act 2008 ("the Act") reads as follows:

> *"**72 Unsatisfactory conduct***
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

[9] Rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 reads:

> *"9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law."*

Further Oral Evidence Before Us

[10] The appellant confirmed his brief of evidence and stressed that his concern is that the licensee breached Rule 9.1 in his view.

[11] There now seems to be no dispute that, by emails of early October 2010, the appellant repeatedly requested that the word *"Auction"* be embedded in the photographs to appear in newspapers as part of a $7,000 advertising campaign agreed to by the appellant and the licensee in early September 2010, and paid for then by the appellant. At this point that is the concern of the appellant (and his wife) rather than any issues about the licensee's views on the appropriate asking price for the property.

[12] Simply put, the stance of the appellant and his wife is that they were paying for print advertising in advance and consider that, therefore, their instructions should have been followed by the licensee.

[13] A peripheral aspect is that the prime advertising medium was to be the NZ Herald newspaper over a four week period but that newspaper, somehow, missed out on the first week (but compensated the appellant). Accordingly, the appellant felt it was even more important that his instructions should have been followed about embedding the word *"Auction"* in the photographs inserted in the newspaper.

[14] It concerns the appellant that he was never advised at the outset that he could not determine the advertising content or design of the advertisement. He feels that, if Bayleys management was overriding his requirement, they or the licensee ought to have conferred better with him and considered withdrawing from the listing and refunding the $7,000 which he had paid *"up-front"* for advertising. It seemed to irritate him that, perhaps, Bayleys were over-interested in their corporate profile at the expense of his marketing campaign.

[15] In oral evidence before us, the appellant confirmed his above views in greater detail and provided further background. On 4 October 2010, he seemed to have emphatically required the embedding of the word *"Auction"* on the photograph of the property but was told that Spillers could not do that. The appellant thought they had misunderstood him and emailed the type of photograph he required to be used but that was not done. Also (as already covered) he said that, somehow, the first week's advertising in the NZ Herald was lost so that only a three week advertising campaign period remained towards the auction. The appellant did not seem concerned about the colour of the addition of the word *"Auction"* (but preferred red) but required that it be embedded so that the concept of auction stood out from the photograph. However, he was told that would be a breach of Bayleys' advertising rules and could not be done by the licensee, or by Spillers as a franchisee of Bayleys.

[16] The appellant mentioned that the rateable value of the property, at material times, was $980,000 but that he and his wife only expected to sell it in the high $800,000s due to the real estate market then being very depressed. Apparently, post-auction negotiations through the licensee led to an offer at about the $800,000 level which the appellant would not accept, and the appellant sold the property privately for $840,000 some months later. It seemed that, from the outset, the vendor and his wife realised that the market was deflated and they would need to lower their asking price, in terms of the property's rateable value, by about 15%.

[17] It had also irritated the appellant that, after the first viewing by interested parties of the property, Spillers put it to the appellant that the value of the property would be about $750,000. However, his prime concern is that he was never told there was a guideline advertising approach, which seemed to be a requirement for franchise holders with Bayleys, that Bayleys' advertising protocols must be observed even if contrary to the requirements of the vendor. Spillers had provided the appellant with samples of advertising methods but it was not made clear that the appellant's requirements about detail would not be followed. The appellant put it *"We signed a quote which is without much detail"*.

[18] It seemed to us that the appellant seeks a finding of unsatisfactory conduct against the licensee and a refund of $3,500 as about half the advertising costs paid by him.

[19] We understood that the NZ Herald apologised for the omission of the first week of the advertising campaign and made that aspect up to the vendor, and that the licensee and Spillers did their best in that respect and over the photograph issue also.

[20] The vendors put their concern as that Spillers refused to allow them to have any input into the advertising and that is their concern in terms of their complaint and this appeal hearing. They put it:

> *"We as vendors were refused a reasonable request to utilise the word 'auction' within the adverts because of a Bayleys' 'image'. That would be fine if Bayleys were paying for the promotion but they were not. We were!*

> *The complaint should not be seen as anything but the refusal by the agency to allow us as the vendors to have 100% signoff on advertising that we were paying for.*
>
> *Anything short of that is nothing more than the vendor paying an agency to market their own brand and not the property."*

Evidence of the Licensee/Second Respondent

[21] Prior to the hearing before us, it was put for the licensee that she understood this appeal to be confined to the issue of *"the refusal by the agency to allow the complainants, as the vendors, to have 100% signoff on advertising that they were paying for"*. It was also put that there had been evidence to the Committee from Mr Richard Graham of Bayleys that, as the franchisor, Bayleys controlled all brand standards and that Spillers, as franchisee, had no ability to formulate advertisements in accordance with the particular instructions of the appellant, and the Committee had accepted that.

[22] The licensee said that Bayleys' initial current market assessment of the property was in the mid $800,000s. She said that the Herald generously compensated the appellant for its error and that her firm provided much extra advertising, including the dropping of cards, as further compensation for the loss of the first week of the advertising campaign.

[23] The licensee is distressed at the appellant's criticism of her and her firm and is most apologetic to the vendors, but feels that she and Spillers did their utmost to obtain the best market price for the appellant and his wife. She said that she and her colleagues sought to meet with the vendors over the issue of the use of the word *"Auction"* in the photograph, but the vendors would not come to such a discussion meeting.

Jurisdiction on Appeal

[24] The Committee made a determination under s.89(2)(c) of the Act to take no further action on this appeal.

[25] Section 111 provides a right of appeal to us for any person affected by a determination of a Complaints Assessment Committee, including any determination under s.89. The appeal is by way of rehearing and, after hearing the appeal, we may confirm, reverse, or modify the determination of the Committee.

[26] In *Kacem v Bashir* [2010] NZFLR 884, the Supreme Court articulated principles identified by the Court in the earlier case of *Austin, Nichols & Co Inc v Stichting Lodestarn* [2008] 2 NZLR 141 as follows:

> *"[32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for*

> *a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant consideration; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary."*

[27] This Tribunal has previously held that Committee determinations under s.89 are subject to general right of appeal and the wider principles described in *Austin Nichols* will apply. In *Jones v CAC 10028 and Shekell* [2011] NZREADT 15, the Tribunal said:

> *"[25] Determinations pursuant to s.89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s.89 would generally be regarded as 'general appeals'. All parties agree that the Tribunal should apply the principles set out in Austin, Nichols as reiterated by Kacem v Bashir."*

[28] We have before us all the material previously before the Committee as well as further evidence filed and given by the parties for the purposes of this appeal. We can consider all the material in exercising our own judgment as to the facts and which of the orders available on appeal is appropriate.

Discussion

[29] It has been put by the appellant that the license was in breach of the said Rule 9.1 in that she did not act in the best interests of her client nor act in accordance with the client's instructions; so that she is guilty of unsatisfactory conduct.

[30] The evidence before the Committee suggested that the licensee was acting in accordance with Bayleys' guidelines on advertising in declining to add the word *"Auction"* in red to the advertising photograph as requested by the appellant. The Committee also noted that Spillers recognised that the appellant was unhappy with this state of affairs and offered compensation through additional advertising at no cost. We confirm those views of the Committee.

[31] Mr Wimsett put it that the fundamental point for us to decide is the extent to which the licensee is responsible for the situation of concern to the appellant and his wife, i.e. that Bayleys would simply not permit the use of the word *"Auction"* embedded in red on an advertising photograph of a property under their brand. At that point the licensee and Spillers simply could not implement the direction from the appellant without breaching their franchise contract with Bayleys. In other words, Spillers (and hence, the licensee) had two competing interests and conformed to the Bayleys' contract or protocol but tried to appease the appellant by providing extra free advertising and apologising. The appellant's case is not against Bayleys but against the licensee. We accept that she was placed in a very difficult practical position and is now having her relevant conduct scrutinised.

[32] It seems to us that a real estate agent is acting as agent for a vendor and, therefore, should comply with the vendor's reasonable requirements. The vendor is the principal and the real estate agent is the agent of that vendor/principal. If the

agent is subject to advertising protocols they must be spelt out clearly to the vendor before the property is listed. Here, there was a failure of such communication at the outset, but the dilemma of the licensee would not have been easily foreseeable.

[33] It seems to us that such franchisees must be careful that their franchise agreements, with consequential protocols, are sensible and realistic. In particular, when discussing a marketing campaign, a franchisee must disclose any such restrictions to a vendor. That does not seem to have adequately happened in this case but, in many ways, that failure is understandable.

[34] Spillers maintain that buyer feedback for the property was that its value was in the mid $700,000s rather than the $800,00s, as was communicated to the appellant. The Committee noted that the only offer forthcoming for the property was negotiated to a level not significantly different to the appraised value. It found that there was no evidence that Spillers had misled the appellant as to the value of the property. We agree.

[35] Insofar as there are still any traces of concern about whether the licensee and Spillers firm were sensibly focused about the price or value of the appellant's property, we take into account that the appellant does not push this point at this stage and that the sale procedure was to auction which, theoretically, should be a good test of market value. We can certainly understand that appellant's viewpoint that the feedback that the property was worth about $750,000 was unrealistic and should not have influenced a real estate agent, if it did.

[36] However, simply put, the concern of the vendor (and his wife) appellant is that they wanted a type of stamp of the word *"Auction"* along the left side of the advertising photograph highlighted by embedment in red; and they were paying for that, but were told it could not be done because it would be a breach of Bayleys' advertising protocols. The appellant feels that he is the client and the principal and that the licensee was his agent; and that he should not have been thwarted by Bayleys with regard to a lawful direction, and he submits that must be a breach of Rule 9.1.

[37] We accept that, in theory, the appellant has quite some merit in his concerns and we agree with him, of course, that Rule 9.1 must be complied with by licensees to the letter.

[38] Very simply put, in the present case the appellant had signed an advertising proposal (ABD 12) which was rather general. He had not then thought of embedding the word *"Auction"*, as described above, and had effectively given the real estate company (Spillers) a general warrant to handle the advertising campaign in accordance with their usual protocols. He gave the licensee the go-ahead and had paid up front on that general basis. When the licensee and Spillers realised their dilemma between carrying out the appellant's instructions and breaching Bayleys' franchise protocols, they endeavoured to make amends in a generous and sensible way. No loss has arisen out of this situation at a time when the market was difficult for vendors.

[39] In terms of the overall justice of this particular situation, we do not think that the conduct of the licensee second respondent is particularly concerning. However, on a

wider note, we are concerned that franchisees can, in good faith, be in breach of duty to a vendor because the vendor's reasonable instructions may put them in breach of contract with the franchisor.

[40] When we stand back and look at this situation objectively, we feel it would be unjust on the licensee to allow this appeal; and we confirm the decision of the Authority (through its Committee) to take no further action. Accordingly, this appeal is dismissed.

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Judge P F Barber
Chairperson

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Ms J Robson
Member

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Mr G Denley
Member